[2017] UKFTT 0339 (TC)

TC05816

Appeal number: TC/2013/07292

INCOME TAX – penalties for not filing return on time – whether penalty under para 4 Sch 55 FA 2009 valid after* Donaldson: *no – whether reasonable excuse for not filing: yes, excuse ceased but default remedied in time – whether para 5 and 6 Sch 55 penalties valid: possibly not, but no need to decide – whether HMRC can "remove" a penalty where notice not served: no.

FIRST-TIER TRIBUNAL
TAX CHAMBER

THOMAS RICHTER **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE RICHARD THOMAS

The Tribunal determined the appeal on 12 April 2017 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 22 October 2013 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 13 February 2017.

1. This decision is made after consideration on the papers of an appeal by Mr Thomas Richter ("the appellant") against assessments made by the respondents ("HMRC") to penalties under paragraphs 3, 4 5 and 6 of Schedule 55 Finance Act 2009 ("Schedule 55").

Facts

2. As this case was decided on the papers there is obviously no oral evidence. I have in this case:

(1) the correspondence between the appellant's agent and HMRC, including the appeal,

(2) a computer screen printout of the details of the return issue dates, type and date of filing,

(3) a computer screen printout showing the amounts of the penalties and the dates of the making of the assessments, and

(4) the Notice of Appeal sent to the Tribunal.

3. From those documents, and from certain statements made by HMRC in the statement of case which I have no reason to doubt, I find the facts as follows. But before setting out those facts I mention some documents which I do not have (many of which I have been provided with in other cases of this nature which I am currently considering):

(1) a copy of any reminders and warnings sent to the appellant or even samples of the standard reminders that are generally given,

(2) a copy of the notices of assessment or any sample of the relevant notices,

(3) any "SA Notes" an often useful detailed account of communications of whatever nature with a taxpayer and actions taken by HMRC,

(4) any indication of what the appellant's occupation was in the tax year 2010-11, and how long he had been carrying it on, and

(5) any indication of what his liability to tax was in any previous tax year.

4. The appellant was issued with a notice to file an income tax return for the tax year 2010-11 on 6 April 2011. That notice required the appellant to deliver the return by 31 October 2011, if filed in paper form, or by 31 January 2012 if filed electronically (either date, according to the method employed, being "the due date").

5. On 14 February 2012 (the statement of case says, wrongly, 2011) HMRC issued a notice informing the appellant that a penalty of £100 had been assessed on him for failure to file the return by the due date.

6. On 16 July 2013 HMRC issued a notice informing the appellant that a penalty of £900 (£10 per day for 90 days) had been assessed on him for failure to file the return within the period of 3 months beginning with the day after the due date (that date being the "penalty date").

7. That notice also informed the appellant that a penalty of £300 had been assessed on him for failure to file the return within 6 months from the penalty date and that a penalty of £300 had been assessed for failure to file the return within 12 months from the penalty date.

8. The return was filed electronically on 16 August 2013. As a result of that method of filing the due date was retrospectively fixed at 31 January 2012 and the penalty date at 1 February 2012.

9. On 4 September 2013 the appellant, by his agent Mr Bristow of Cairns Financial Services, appealed to HMRC against the penalties for the year 2010-11 (and for 2011-12, but these are not the subject of this decision).

10. On 24 September 2013 HMRC wrote to the appellant about the 2010-11 penalties refusing to accept the appeals on the grounds that they were late. (Also on that day HMRC wrote to the appellant about the 2011-12 penalties with their view of the appeal rejecting the grounds put forward by his agent).

11. On 22 October 2013 the appellant notified an appeal to the Tribunal. It referred to penalties of £757.48 and gave as the latest time by which the appeal ought to have been made as 31 January 2013. The reason given for the lateness of the appeal was that the appellant was in prison between February 2012 and February 2013.

12. HMRC also say in the statement of case that they do not oppose the application to appeal late against the other penalties, the £900 and the two of £300.

The law

13. Paragraph 1 Schedule 55 makes a person liable to a penalty if that person (who is labelled "P") fails to deliver by the due date a tax return required by s 8 Taxes Management Act 1970 ("TMA").

14. Paragraph 3 imposes a penalty of £100 for that failure.

15. Paragraph 4 imposes a further penalty:

> "(1) P is liable to a penalty under this paragraph if (and only if)—
>
> (a) P's failure continues after the end of the period of 3 months beginning with the penalty date,
>
> (b) HMRC decide that such a penalty should be payable, and
>
> (c) HMRC give notice to P specifying the date from which the penalty is payable.
>
> (2) The penalty under this paragraph is £10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under sub-paragraph (1)(c).
>
> (3) The date specified in the notice under sub-paragraph (1)(c)—
>
> (a) may be earlier than the date on which the notice is given, but

(b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a)."

16. Paragraph 5 also imposes a further penalty:

> "(1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 6 months beginning with the penalty date.
>
> (2) The penalty under this paragraph is the greater of—
>
> (a) 5% of any liability to tax which would have been shown in the return in question, and
>
> (b) £300."

17. As does paragraph 6:

> "(1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 12 months beginning with the penalty date.
>
> (5) … the penalty under this paragraph is the greater of—
>
> (a) 5% of any liability to tax which would have been shown in the return in question, and
>
> (b) £300."

18. I note that the extracts from paragraph 6 Schedule 55 given by HMRC in their statement of case show a version of sub-paragraph (5) which only applies in years after 2010-11.

19. Both of paragraphs 5 and 6 use a term that must be applied when calculating the penalty, "any liability to tax which would have been shown in the return in question". That phrase is explained in paragraph 24 Schedule 55:

> (1) References to a liability to tax which would have been shown in a return are references to the amount which, if a complete and accurate return had been delivered on the filing date, would have been shown to be due or payable by the taxpayer in respect of the tax concerned for the period to which the return relates."

Paragraph 24 goes on to deal with the case where a return is not filed before a paragraph 5 or 6 penalty is assessed.

> "(2) In the case of a penalty which is assessed at a time before P makes the return to which the penalty relates—
>
> (a) HMRC is to determine the amount mentioned in sub-paragraph (1) to the best of HMRC's information and belief, and
>
> (b) if P subsequently makes a return, the penalty must be re-assessed by reference to the amount of tax shown to be due and payable in that return (but subject to any amendments or corrections to the return).
>
> …"

20. Paragraph 24 was not included in the extracts from Schedule 55 in HMRC's statement of case.

21. Paragraph 4 has been the subject of consideration by the Court of Appeal in *Donaldson v HMRC* [2016] EWCA Civ 761 ("*Donaldson*"). It is because the appeal in that case, which was also about the tax year 2010-11, was only finally determined late in 2016, when permission to appeal was denied by the Supreme Court, that this case is only now being considered (along with many other similar cases which were also stayed behind *Donaldson*).

22. The Court of Appeal in *Donaldson* decided as follows.

23. First, the requirement in paragraph 4(1)(b) Schedule 55 (that P is liable to a penalty only if HMRC decide that a penalty should be payable) was met because of, and as a result of, a decision of a policy committee of HMRC officials (and possibly others), taken before Schedule 55 came into force, that in all cases without exception penalties under paragraph 4 would be sought whenever, once the legislation had come into force, any future P failed to deliver a return before the elapsing of 3 months from the penalty date.

24. Second, the requirement in paragraph 4(1)(c) Schedule 55 (that P is liable to a penalty if, and only if, HMRC give notice to P specifying the date from which the penalty is payable) was met, in Mr Donaldson's case, because he had received:

(1) an "SA reminder" which stated that if he failed to file a paper return by 31 January 2012 "a £10 daily penalty will be charged for every day it remains outstanding. Daily penalties can be charged for a maximum of 90 days starting from 1 February for paper tax returns" and

(2) a notice of assessment of the £100 penalty (SA 326D) which stated that if the return was more than 3 months late "we will charge you a penalty of £10 for each day it remains outstanding. Daily penalties can be charged for a maximum of 90 days starting from 1 February".

25. What the Court of Appeal did not decide is what the position is for a person who does in fact file their return electronically.

26. In *Donaldson* the Court of Appeal also decided that the requirement in paragraph 18 Schedule 55 that an assessment to penalties must "state in the notice the period in respect of which the penalty is assessed" is, in a paragraph 4 assessment, a requirement to state the period "over which the penalty has been incurred". This was clarified by Lord Dyson MR as being the "three month period" (see [26] of *Donaldson*) and he said that Mr Donaldson (and any P) had to be told the start date and the end date so that P could see how the penalty had been calculated.

27. This was not done in Mr Donaldson's case (as no period at all was stated), but despite that, the assessment was held not to be invalid because it was rescued from invalidity by s 114 TMA. This was because the dates could be readily calculated and no misleading of Mr Donaldson occurred. From [29] it can be seen that in Mr Donaldson's case the "three month period" referred to in [26] was the period starting

on 1 February 2012 and ending 90 days later. Thus it seems that despite there being a 3 month period expressly mentioned in paragraph 4(1)(a) (the three months starting with the penalty date) which was in Mr Donaldson's case was the three months November and December 2011 and January 2012, Lord Dyson was in fact referring to the (up to) 90 day period mentioned in paragraph 4(2), thus in Mr Donaldson's case the period beginning on 1 February 2012.

28. P (the appellant) is not however liable to a penalty in certain circumstances. Paragraph 23 provides:

> "(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.
>
> (2) For the purposes of sub-paragraph (1)—
>
> …
>
> (c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased."

29. Finally I mention that because these are penalty assessments with which I am concerned, the burden of showing that they are properly imposed is on HMRC. I mention it because HMRC do not do so in their Statement of Case. They do however mention article 6 of the European Convention on Human Rights, if only to deny that it is applicable in this case because the appeal proceedings here are not about "criminal" matters, but are imposed for mere administrative offences and are not aimed at punishing defaults.

Discussion

Late appeals

30. As HMRC do not oppose the application to the Tribunal under s 49 TMA to admit the penalties I give permission. I, like HMRC, accept that the Notice of Appeal given to the Tribunal is a kind of "rolled-up" application and appeal, so that if I give permission to bring the appeals to HMRC the notice of appeal is treated as given to the Tribunal under s 49A(2)(c) TMA in anticipation that the appeals are allowed to be given to HMRC.

Approach to case: burden on HMRC to show penalties valid imposed (and assessed)

31. Because the burden is on HMRC to show that the penalties have been validly imposed, and only then does the burden switch to the appellant to show that he had a reasonable excuse or some other ground for contesting the penalty, I consider first whether there is anything in the assessments that would make them invalid.

The paragraph 3 penalty and assessment

32. As far as the paragraph 3 assessment is concerned then there is nothing to show that the assessment is not valid. All HMRC need to show is that the return was indeed received late. The "Return Summary" shows that it was, and that it as received on 4 September 2013 and the appellant has not challenged that.

33. But in their statement of case HMRC say that in view of the period of "incarceration" it is likely that the notice of assessment (probably) dated 14 February 2012 imposing a late filing penalty of £100 in all likelihood did not reach the appellant and they "have taken the decision to remove it".

34. HMRC do not have the power to unilaterally "remove" a penalty which has been validly assessed. By paragraph 18(3) Schedule 55 an assessment of a penalty is to be treated for procedural purposes in the same way as an assessment to the tax concerned, which tax is income tax and capital gains tax ("CGT"), and those procedures are to be found in TMA.

35. By s 30A(4) TMA an assessment to income tax or CGT may not be altered except in accordance with the express provisions of the Taxes Acts. The assessment under paragraph 3 is valid: what has happened is that HMRC have accepted that the *notice of* assessment was not served on the person assessed as is required by s 30A(3) TMA. They have decided not to re-serve it. But it is under appeal and I have dealt with it in relation to the appellant's claim to have a reasonable excuse for failing to deliver the return.

The paragraph 4 assessment

36. As for the paragraph 4 assessment, for the reasons given in §32 I agree with HMRC that the return was not received before the end of the 3 month period starting on 1 February 2012, so that the requirement in paragraph 4(1)(a) is met. I then obviously need to consider whether there is anything in *Donaldson* which affects the case. HMRC in their statement of case say here (as they do in all the paper cases coming before me now) that I should consider that HMRC have satisfied the requirements of paragraph 4(1)(b) and (c) and that despite the omission of the correct period for which daily penalties have been assessed in the notice of assessment that omission does not affect the validity of the notice.

Paragraph 4(1)(b)

37. The first issue is whether the requirement in paragraph 4(1)(b) is met here. HMRC refer to the policy decision of 2010 but have provided no evidence to me of that decision as referred to in *Donaldson*. I happen to know, for obvious reasons as I was the member of the panel, that, in the hearing of Mr Donaldson's appeal before the First-tier Tribunal, evidence was given about the policy decision and as the gist of that evidence is publicly available (at [178] of the decision in the joined cases *Morgan v HMRC* and *Donaldson v HMRC* [2013] UKFTT 317 (TC) "*Morgan*") I accept that HMRC have shown that the requirement is met.

Paragraph 4(1)(c)

38. The second issue is whether HMRC have shown that the date from which the penalty was payable was specified in a notice to the appellant in accordance with the requirement in paragraph 4(1)(c) Schedule 55.

39. From *Morgan* I know that Mr Donaldson (and Mr Morgan) were issued with an "SA Reminder" and a Form SA 326D which is the notice of assessment of the paragraph 3 £100 penalty.

40. The SA Reminder was issued in batches between 18 December 2011 and 6 January 2012 (*Morgan* at [9]). HMRC cannot tell, and do not record, when the reminder was issued to any particular taxpayer.

41. They do record (I think) when the assessment was made: in this case it was, according to the "View/Cancel Penalties" document in the papers, 14 February 2012. But it is not clear to me that it was issued on that date. In the statement of case HMRC say on page 2 that it was issued on 14 February 2012 – there is a table with a heading "Penalty Issue Date". But on page 5 of the statement HMRC say that the notice of assessment was issued "on or around 14 February". They then put "2011", but that is an obvious mistake and should be "2012". I do not understand how HMRC can be sure on page 2 but unsure on page 5. I do not have a copy of the notice of assessment in the papers so cannot tell when it was dated as having been issued.

42. I have laboured this point somewhat but the precise date of issue of an assessment may be relevant in certain circumstances, but as it turns out not in this one. That is because HMRC have accepted that, whenever it was issued, it was likely that the appellant did not receive the notice of assessment because he was in prison.

43. As I have said HMRC have produced no evidence that the appellant was issued with an SA reminder, and particularly when. I do not know whether the appellant was on remand before trial, when the trial was or what record HMRC had of his address before he was sent to prison. In view of this I find that HMRC have not shown on the balance of probabilities that the appellant received an SA reminder.

44. I note here that neither s 7 Interpretation Act 1978 nor s 115 TMA provide any presumption of valid service in respect of the SA reminder, as s 7 of the 1978 Act applies "[w]here an Act authorises of requires any document to be served by post …" and s 115 applies where "A notice or form … is to be served under the Taxes Acts", and an SA Reminder is not a statutory notice. I suppose it might be argued that as a result of *Donaldson* the SA Reminder is a notice "to be served under the Taxes Acts" as it is the notice (or one of the notices) which specifies the date for the purposes of paragraph 4(1)(c) Schedule 55, but that was not its main purpose which was remind electronic filers of their upcoming deadline for filing.

45. There is evidence on HMRC's own admission that no SA 326D was received by him. And HMRC say that they sent no other reminders or any correspondence at all to the appellant until he notified them of his address on the same day as the paragraph 4 penalty notice was issued.

46. I therefore hold that HMRC have not given any notice to the appellant within paragraph 4(1)(c) Schedule 55 specifying the date from which the daily penalties are payable. The penalty assessment is invalid.

47. It is not then necessary to address the question whether *Donaldson* applies to electronic returns. The question arises because Mr Donaldson filed on paper and the Court of Appeal at [4] and [5] held that the SA Reminder and notice of the paragraph 3 assessment (SA 326D) specified a date of 1 February. No year is mentioned in those documents, which seems to put some strain on the term "specified" if not also on "date", although it may be obvious to the recipient which year the notices were talking about. Mr Donaldson, and other paper filers, may however be forgiven a certain amount of hesitation about the year to which the SA 326D was implicitly referring, given that when he received it the date the SA 326D was specifying had already passed, if the notice intended to refer to 2012.

48. 1 February can only be a specified date for those who do file a paper return. This is because paragraph 4(3)(b) forbids a notice under paragraph 4(1)(c) specifying a date other than one later than the end of the period of 3 months starting with the penalty date, and the penalty date for electronic filers is 1 February.

49. Although it was not mentioned in the judgment of the Court of Appeal, it is clear from *Morgan* (at [53] and [54]) that both the SA reminder and the SA 326D say "Daily penalties can be charged for a maximum of 90 days, starting from 1 February for paper tax returns *or 1 May for online tax returns.*" [My emphasis]

50. Those documents do therefore apply to electronic filers. They have to give both dates because at the time the penalties are assessed it will usually be the case that the return has not been filed and HMRC are unable to say in what form it will be filed. Someone who on 1 February has not signed up to file online may still do so in order to file an outstanding return, and equally someone who is signed up for online filing may actually file a paper return even though it will be usually be prejudicial to their interests to do so (as was actually the case with Mr Morgan in *Morgan*).

51. If paragraph 4(1)(c) permits the SA Reminder and SA 326D to be the notice it refers to, then they are notices specifying two dates, not just one. Either date may be relevant in most cases. I have to accept however that this does not affect the Court of Appeal's decision or its binding status unless I am prepared to say that their not taking into account that the notices referred to two dates but did not refer expressly to a year was *per incuriam*. That is a limb I am not going out on. *Donaldson* must then be interpreted as applying to those who file electronically as well as those who like Mr Donaldson filed on paper.

Paragraph 18(1)(c)

52. As a result of my holding that the penalty assessment is invalid it is not necessary to consider the paragraph 18 point raised in *Donaldson*. But in case I am wrong I consider the point. I do not know what was said in the notice of assessment as I do not have it or a copy in the papers, so I can only make an assumption and I find that it is likely that the notice followed the same pattern as that in the notice of

assessment given to Mr Donaldson (see *Donaldson* at [18] and [26]). If it did it was not invalid by virtue of failing to show the relevant period.

Reasonable excuse: need to consider

53. It is not necessary to consider for the purposes of the paragraph 4 penalty whether the appellant had a reasonable excuse for his failure to file his return on time or whether if there was such an excuse it ceased to be one and whether the appellant remedied the failure to file the return "without unreasonable delay" after the excuse ceased (as required by paragraph 23(2)(c) Schedule 55).

54. But it is relevant for the paragraph 3 penalties and the 6 month and 12 month penalties to consider that issue.

Grounds of appeal: reasonable excuse

55. The grounds of appeal against the penalties are the same as the grounds for the lateness of the appeal, that the appellant was in prison, something which was characterised by the agent as "an unexpected or unusual event which was beyond his control" and so is put forward as a reasonable excuse for not filing the return before the penalty date. The quoted phrase is the one used at that time by HMRC in all letters about late appeals and penalties for late filing to explain their view of what a reasonable excuse is, including in a letter to the appellant about his lateness.

56. I accept that going to prison was an unusual event beyond the appellant's control and that being in prison means that it is difficult if not impossible, for a prisoner to attend to his tax affairs. But the default in filing the return happened before the appellant was sent to prison. No excuse has been put forward to explain that default but I accept that it was likely that on or shortly before the 31 January the appellant will have been preoccupied in dealing with his case. (As I have said at §43 I do not know when the trial took place or whether he was on remand). In my view the pre-imprisonment events gave him a reasonable excuse which continued, or perhaps is better expressed as having morphed into a different reasonable excuse, namely his imprisonment.

57. I therefore accept that the appellant had a reasonable excuse for not filing his return on the due date, an excuse which continued when he was sent to prison and while he was in prison. This excuse means that he is, on the face of it, not liable to any penalties for failing to make his return on time and for failing to deliver his return by the end of the 3 month, 6 month and 12 month periods as he was still in prison on each of those dates.

58. But he was released from prison in February 2013 and did not file his returns until September, probably as a direct result of receiving the penalty notices in August 2013. The papers also say that he did not notify HMRC of his then current address until 16 July 2013. The question is whether there continued to be a reasonable excuse for not filing the return after the appellant's release from prison.

59. When the appellant was released from prison in February 2013 the position would have been that while he may possibly have recalled that he had not filed his tax

return before 1 February 2012, he would have been unaware that a notice of assessment of a £100 penalty for that failure had been issued, unless it had been sent to the address he was occupying both before and after prison, something about which the papers are silent, *and* he found it on release. I think it is more likely that he would excusably have forgotten about the return. There is no evidence that he did or could find out anything about his outstanding return after release from prison and so his excuse continued to be reasonable.

60. But what would have put him on notice of his failure was the receipt by him of the penalty assessments on 16 July 2013. He remedied the failure to file on 16 August which does not in my view amount to unreasonable delay and he therefore continued to have a reasonable excuse for not filing his return late. As a result the penalties under paragraphs 3, 5 and 6 cannot stand either.

Remarks on paragraph 5 and 6 penalties

61. I should say here that in my view if I had considered whether HMRC had discharged the burden on them of showing that the 6 month and 12 month penalties were validly imposed, they might have had some difficulty. The points I mention below were not however argued and because I have in any case found that the appellant had a reasonable excuse for his failure to file which continued until the issue of these penalties, the points do not form part of my decision (ie they are obiter). In an appropriate case however I, or other judges, may seek HMRC's arguments on the point.

62. The assessments were made in time despite the lengthy period from the due date until they were made, as the time limit is two years from that date (paragraph 19 Schedule 55, also not in the statement of case) and in this case that time was less than 18 months.

63. But the paragraph 5 and 6 assessments were made before the return was delivered. In that situation paragraph 24(2)(a) Schedule 55 requires that "HMRC is to determine the amount mentioned in sub-paragraph (1) to the best of HMRC's information and belief."

64. There is nothing in the papers to suggest that any officer of HMRC has done that. It is possible that at some stage between July 2012 when the 6 months from the penalty date were on the point of elapsing an officer considered whether the past history of returns and payments of the appellant would justify a larger penalty than £300 and made a note to that effect. It is possible it was also done at or before the 12 month stage in January 2013. It is even possible that it was done some short time before 16 July 2013 when the appellant became visible and contactable. It might even have been done on that day after notification by the appellant of his address but before the assessments were issued.

65. I rather doubt it though. This is because I was informed earlier this month by an HMRC presenting officer in a case I was hearing (not published, as it was a summary decision only) that when the HMRC SA computer trawls its database for cases where a return has been issued but not received before the 6 month point (and I assume the

12 month point) that computer is programmed to issue, in all cases, a £300 penalty and that the computer is not programmed to interrogate any data it has about past liabilities.

66. I have since confirmed that that is the practice by examining HMRC's manuals. The relevant paragraph is in the Self Assessment Manual at SAM 61240.

67. It does not seem to me that this practice involves an officer of HMRC examining information or, particularly, forming a belief about anything. Computers are able to retrieve information if they are programmed to do so, but not even the most sophisticated computers can (yet) form beliefs, and certainly not those operated by HMRC. But whatever a computer can or cannot do and whatever may the position in other statutory contexts in the Tax Acts or elsewhere, there is a pointer in paragraph 24(2) that a flesh and blood human being is required for the purpose of that sub-paragraph. That pointer is the use of the phrase "HMRC is". In other parts of Schedule 55 HMRC takes the plural:

(1) "HMRC decide" - paragraph 4(1)(b)

(2) "HMRC give" – paragraph 4(1)(c)

(3) "HMRC think …, they" – paragraph 16(1)

68. In the absence of any indication that a human being formed a belief about the level of penalty appropriate in this case I find it difficult to see how the automatic paragraph 5 and 6 assessments can be valid.

69. The HMRC presenting officer also informed me that when the return is received then if the applicable penalty turns out, on the basis of the information in the return, to be greater than £300 then a further or amended assessment is made. It is also difficult to see that such an amendment or assessment complies with paragraph 24(2)(b) (because that requires a re-assessment, not an assessment, of the penalty calculation). Possibly paragraph 18(4) (supplementary assessments) would come to the rescue, but that requires there to have been an earlier underestimate of the tax liability shown in a return. In this type of case there would have been no assessment of tax liability so nothing to trigger a supplementary assessment.

Paragraph 18(1)(c) and the other penalties

70. I have dealt with the paragraph 18(1)(c) point as it applies to the paragraph 4 assessment (at §52). Paragraph 18(1)(c) though applies to all assessments. In the case of assessments under paragraphs 3, 5 and 6, paragraph 18(1)(c) only makes sense if "period" in that paragraph means "tax year", because those other paragraphs do not have the preconditions found in paragraph 4(1)(b) and (c). Some support for what is the only possible construction for these other paragraphs that makes sense can be found in Schedule 24 Finance Act 2007 ("Schedule 24"). There paragraph 13(1)(c), the equivalent for assessments for the penalties there dealt with to paragraph 18(1)(c) Schedule 55, says:

> "Where P becomes liable for a penalty under paragraph 1 or 2 HMRC shall—

…

(c) state in the notice a tax period in respect of which the penalty is assessed"

71. "Tax period" is defined in para 28(g) Schedule 24:

> "tax period" means a tax year, accounting period or other period in respect of which tax is charged"

72. Thus a notice of a paragraph 3, 5 or 6 assessment must show the tax year concerned, in this case 2010-11. Again I have no documents or information to show that each did. The only information I have is from the Self Assessment "View/Cancel Penalties" screenshot which shows the Tax Year 2010-11. That no doubt is the tax year for which the assessments were made: but it does not prove what the notice of assessment says.

73. It is clear from *Morgan* at [53] that the SA 326D in that case contains the wording:

> "**Your tax return for the year ended 5 April 2011 was not sent in on time."** [the emboldening is HMRC's]

That does specify the tax year and therefore the period mentioned in paragraph 18(1)(c). I am prepared to assume that that wording was also on the SA 326D addressed to the appellant and was on the notice of assessment for the paragraph 5 and 6 penalties.

74. If it was not, then the question arises whether the absence could be rectified by s 114 TMA, as the notice under paragraph 4(1)(c) was in *Donaldson*. By s 114(2) TMA "[a]n assessment shall not be impeached or affected … by reason of any variance between the notice and the assessment". Strictly if I am considering impeaching anything it is the notice, not the assessment, so s 114(2) does not rescue it. However as this issue is also not necessary for me to determine I do not do so.

75. How much better it would have been though if I had been given *all* the relevant papers.

76. A final thought on paragraph 18(1)(c). It seems to be the case that in Donaldson the Court of Appeal was saying that a paragraph 4 assessment need not show the tax year to which it applies. At [25] Lord Dyson MR said:

> "I do not accept Mr Vallat's [counsel for HMRC] submission. It is true that in some contexts the phrase "period in respect of which the penalty is assessed" is the relevant tax year. But in the context of a daily penalty, I consider that the most natural interpretation of the phrase is that it refers to the period over which the penalty has been incurred."

77. As in §73 where I accept that the wording quoted there would have appeared on the paragraph 3, 5 and 6 notice of assessment, I also find that it would have appeared on the paragraph 4 notice of assessment in this case, if only because HMRC would

have been unaware in 2012 (and 2013 when the notice in this case was issued) that *Donaldson* would say that it was not necessary to show the tax year concerned.

78. It would of course be good customer service if they continue to show the tax year on paragraph 4 assessments even if there is no statutory requirement to do so.

Special circumstances

79. Although this too is unnecessary, I add that in relation to all the assessments HMRC have addressed the question whether there were special circumstances, but have found none. I cannot say that this decision was flawed.

Decision

80. In accordance with paragraph 22(1) Schedule 55 Finance Act 2009 I cancel the penalty assessments made under paragraphs 3, 4, 5 and 6 of that Schedule.

81. As already noted in their statement of case HMRC say that in view of the period of "incarceration" it is likely that the notice dated 14 February 2012 imposing a late filing penalty of £100 did not reach the appellant and they "have taken the decision to remove it". I have addressed why HMRC cannot take this action at §§35 and 36.

82. And so the paragraph 3 assessment was still before me as being under appeal and I have dealt with it. For the avoidance of doubt I have cancelled it because the appellant had a reasonable excuse for not filing the return by the due date.

83. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 24 APRIL 2017